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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 181

WELLS LAMONT CORPORATION, A CORPORATION,
Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR, and
JAMES G. ROGERS, ACTING ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable The Justices of The Supreme Court of the United States:

Your petitioner, Wells Lamont Corporation, respectfully petitions for a writ of certiorari to review a judgment and decision of the United States Emergency Court of Appeals. The judgment, entered by that court on May 1, 1945, dismissed petitioner's complaint which was filed, first, with respect to the validity of the provisions of Section 1499.2 of the General Maximum Price Regulation as interpreted by the Price Administrator in their application to petitioner and to others similarly situated in the glove industry, and second, with respect to the validity of the provisions of Amendment 33 to the Gen-

eral Maximum Price Regulation. To the extent that the lower court's judgment and decision relate to the question of the validity of Amendment 33 to the Regulation, they are not involved in this petition for review.

The case was brought by petitioner in the United States Emergency Court of Appeals under the provisions of Section 204(a) of the Emergency Price Control Act of 1942, as amended, on appeal from an order of the Price Administrator* denying petitioner's protest (R., 53). As required by the provisions of the Emergency Price Control Act, the grounds relied upon by petitioner in its appeal to the Emergency Court of Appeals were included among the objections set forth in petitioner's original protest filed with the Price Administrator.

Opinions and Amendment to Opinion Below.

The Price Administrator's opinion accompanying his denial of petitioner's protest is not officially reported, but is found on pages 54 to 63 of the record in this case.

The opinion of the Emergency Court of Appeals, filed at the time of entry of the judgment dismissing petitioner's complaint, is set forth in the record at pages 126 to 129. A petition for rehearing thereafter filed was denied by the court, but the order of denial incorporated an amendment by the court to its opinion as originally rendered. The order of denial and the amendment to the opinion appear in the record at pages 139 and 140. The court's opinion, as originally filed and as thereafter amended, is not yet in the official reports.

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* The order was issued in the name of James G. Rogers, Acting Administrator.

Jurisdiction.

The judgment of the Emergency Court of Appeals was entered on May 1, 1945 (R., 130). The petition for rehearing was denied by the court on May 28, 1945.

Jurisdiction is invoked under Section 204(d) of the Emergency Price Control Act of 1942, as amended,* and under Section 240 of the Judicial Code, as amended (U. S. C. A., Title 28, Section 347).

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* Section 204(d) of the Emergency Price Control Act of 1942, as amended, provides:

> "Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in Section 240 of the Judicial Code, as amended * * *." (U. S. C. A., Title 50, App. Sec. 924(d).)

STATEMENT OF FACTS AND MATTERS INVOLVED IN THIS PETITION

Section 2(h) of the Emergency Price Control Act.

The judgment, of which this petitioner seeks a review, involves the question of the proper construction and application of the provisions of Section 2(h) of the Emergency Price Control Act (U. S. C. A., Title 50, App. Sec. 902(h)).

As originally adopted Section 2(h) reads as follows:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." *

The provisions of Section 2(h) of the Act are involved in connection with petitioner's claim that the provisions of Section 1499.2 of the General Maximum Price Regulation are invalid and contrary to law, as they have been interpreted by the Price Administrator in their application to petitioner and to others similarly situated in the glove industry. It is petitioner's claim that those

* This is the way Section 2(h) read at the time the regulation questioned by petitioner—the General Maximum Price Regulation—was issued by the Price Administrator on April 28, 1942. Section 2(h) of the Act was amended on July 1, 1944, by the Stabilization Extension Act of 1944, so that the balance of the Section, following the word "industry," now reads:

> "* * * *or changes in established rental practices*, except *where such action is affirmatively found by the Administrator to be necessary* to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." (The words added by the amendment are in italics.)

provisions of the Regulation, as so interpreted by the Price Administrator, are invalid and contrary to law in that they exclude the use of the practice of "in-line" pricing, traditionally and customarily employed in the sale and distribution of gloves by petitioner and by others similarly situated in the glove industry, thereby violating the provisions of Section 2(h) of the Act.

The Practice of "In-line" Pricing.

"In-line" pricing is a practice which has been in general use in the glove industry for more than 15 years. The practice has arisen and the use of it has become necessary in order to meet problems which are peculiar to the glove industry. These problems involve the fixing of the hundreds of different prices for the products manufactured and distributed by those engaged in the glove business. These glove-products are sold at comparatively very low prices. The price ranges for the various models of gloves are relatively narrow; and a large number of "styles" may fall within each such price range (R., 5, 6, 94).

Scores of "styles," among the hundreds which have been developed in the industry, are identical models of gloves except for minor differences in their construction. These substantially identical styles carry minor differences in their selling prices. They are identified on the published price-lists by their "style" or "stock" numbers (R., 6, 23-37, 1941 Catalog, R., 38).

The hundreds of styles developed in the glove industry have traditionally been separated into several classes of gloves. Each class embraces the styles of gloves which are identical models except for very minor differences in the construction of those styles.

A general glove group—such as the Full Leather, Leather Palm, Rubber, Jersey, or Cotton Flannel group—may include several of such separate classes of substantially identical styles. (R., 6, 94-95).

The minor differences between the selling prices of the styles within each class have been standardized on the basis of a fixed differential for each of the minor differences in the construction features of those styles. From the time of its inception and throughout the period of its use, the differential representing a particular construction feature remains, in the main, at the same cent-amount. In its application, the difference between the selling price of the style of glove which carries that feature and the style of glove which is identical except for that feature, is exactly equal to the cent-amount of that differential (R., 6, 7). That cent-amount ordinarily remains exactly the same over a period of years even though, during that period, the selling prices of *both* gloves may be very substantially increased or decreased.

The same general method applies where more than one feature is involved. For example, where there are two features, the difference between the selling price of the style of glove which carries both features and the identical model which does not, is exactly equal to the sum of the cent-amounts of the two differentials applicable to those features (R., 6-7).

In the case of this petitioner, in the year 1941 it manufactured and sold more than 400 "styles" of gloves. During March of 1942—when materials were less available and labor conditions were becoming difficult—more than 300 styles were being manufactured and offered for sale by petitioner. The highest priced glove which petitioner offered in its March 1942 price list was $1.02-1/12 per pair

($12.25 per dozen pair). The gloves offered in that price list ran as low as 8⅛¢ per pair (97½¢ per dozen pair) (R., 2, 31-37).

Among the gloves offered by petitioner and others in the industry, the standard type of "Cotton Flannel" model, embracing a class of substantially identical glove styles, furnishes a typical example. A minor difference in construction between styles in this class involves weight of material: The 8-ounce glove is customarily used as a base for "in-line" pricing of the same style of glove in other weights. Accordingly, heavier weights in that model are priced by adding the "per-ounce" differential, fixed under "in-line" pricing methods, to the base 8-ounce glove price; and lighter weights in the cotton-flannel class are priced by subtracting the fixed "per-ounce" differential from the base 8-ounce glove price (R., 6, 95, 1941 Catalog, R., 38).

A typical example showing the standardized difference in price between two otherwise identical styles within a single class of glove—reflecting a minor difference in another construction feature—is found in two "Leather Palm" styles:

(Taken from "Schedule A," R., 45.)

Style No.	Subject Glove Description	Style No.	"In-Line" Base Glove Description
3132	Leather Palm Band	3130	Leather Palm Band* (plus Knuckle strap and continuous heel)

"In-line" pricing in the glove trade had established a customary price differential of an additional 25¢ per dozen pair (2-1/12¢ per pair) for the knuckle strap feature and 25¢ per dozen paid for the continuous heel feature of style

* Inadvertently described as "Leather Palm Gauntlet" in Schedule A (R., 45).

3130. The "in-line" price of the subject glove, style 3132, is accordingly reached in this way:

March 17, 1942 list price for one dozen pairs style 3130 ("in-line" base glove)	$5.75
Deduct customary per-dozen price differential of 25¢ for knuckle strap and 25¢ for continuous heel feature	.50
"In-line" price for one dozen pairs style 3132, as shown on March 17, 1942 price list	5.25

(R., 7.)

The *selling* prices of both styles had increased approximately 10% from the selling prices quoted for them in the next preceding price list, which was published on December 1, 1941. Yet the 25¢ differential for the knuckle-strap and the 25¢ differential for the continuous heel features remained the same in *both* price lists (R., 45).

Petitioner's December 1941 and March 1942 Price Lists.

Petitioner issued a quarterly price list for its gloves on December 1, 1941. Commitments and contracts of sale at those prices were made during December and January for almost the entire period, ending March 17, 1942, during which the December price list was to have been in effect (R., 2, 93).

On March 17, 1942—more than a month *before* the issuance of the General Maximum Price Regulation—petitioner issued to its customers a new price list on all of its gloves (R. 2, 94, 22, 30).

Substantial increases in its labor, material and other manufacturing costs during the latter part of 1941 necessitated increases in petitioner's March 17, 1942 prices over those previously published—that is, over the prices published in its December 1, 1941 price list (R., 2-3, 94). This increase in the published selling prices of all of petitioner's

gloves amounted to approximately 10%. "In-line" pricing methods were employed with respect to the maintenance of the fixed differentials, reflecting the various minor differences in construction features, between the substantially identical styles within each class of gloves. As a result of the application of those methods and in spite of the general increase of approximately 10% in the selling prices of all gloves in all classes, the cent-amount of each such differential for each minor construction feature remained, in the main, exactly the same (R., 44-51).

Deliveries of petitioner's gloves continued into the month of March at December prices under commitments and contracts made during December, 1941, and January, 1942. In addition, deliveries of some styles in each separate class of substantially identical styles were made before the end of March, 1942, at the prices quoted in the March 17, 1942 price list on orders taken immediately following its issuance. And the increased price quoted in the March 17, 1942 price list for each style of glove was correctly fixed, in its relation to the prices quoted for all other styles in the sale class, according to customary and traditional "in-line" pricing methods in general use in the glove trade (R., 3, 95).

As has been admitted by the Price Administrator in this proceeding, it is essential to the conduct of their business that petitioner and like manufacturers in the industry use "in-line" methods in pricing the gloves sold and distributed by them (R., 6, 94). Accordingly, unless petitioner's March 17 published prices could be used as its ceiling prices, established on the basis of deliveries completed during March and at March 17 prices of one or more styles within each separate class of substantially identical styles, it would be forced to roll back *all* of its prices to those published in its December 1941 list. The selling prices quoted in its December list were approximately 10% lower than

its March prices; and as has been established by petitioner's sworn evidence, such a roll-back would have resulted in severe hardship and have made it difficult, if not impossible for petitioner to continue in the glove business (R., 3).

Issuance of the General Maximum Price Regulation and OPA's Oral Interpretation.

The General Maximum Price Regulation* was issued and became effective April 28, 1942. The provisions of Section 1499.2 of that Regulation, the validity of which is questioned by petitioner, are quoted in Appendix A at the conclusion of this petition (pages 33 to 36). Certain amendments made since the issuance of the Regulation are included in the quoted provisions but they are irrelevant to the point in issue here.

As stated above, the General Maximum Price Regulation was issued more than a month after publication of petitioner's March 17, 1942 price list. Thus, it was issued more than a month after the selling prices in that list had been fixed and the "in-line" differentials had been applied in the determination of those selling prices.

Subsequently, on June 3, 1942, "in-line" pricing was discussed by petitioner's president in a conference held in Washington with the Acting Chief of the Work Clothing Unit Division of the Office of Price Administration and with the Acting Chief's assistant. Those OPA officials issued an oral interpretation to the effect that petitioner's use of "in-line" pricing in determining the ceiling prices for its gloves—that is, the selling prices quoted in its March 17, 1942 price list—was proper under the provisions of Section 1499.2 of the Regulation in their application to petitioner (R., 3, 4; also, the former Acting Chief's Affidavit, R., 20 and 21).

* 7 Fed. Reg. 3153.

Petitioner's Compliance With OPA's Oral Interpretation of the Regulation.

Commencing with the effective date on May 11, 1942, of the General Maximum Price Regulation, petitioner had sold its gloves at not exceeding its March 17, 1942 prices—that is, at not exceeding the ceiling prices found by the OPA officials in their June 3, 1942 oral interpretation to have been proper. And petitioner continued so to sell its gloves for more than a year after June 3, 1942, without any change in the oral interpretation being made or communicated to petitioner, either orally or in writing, by the OPA (R., 4).

On or about August 18, 1943, petitioner was advised through the Chief Enforcement Attorney of the OPA in Chicago that it had been making sales for more than a year past at "over-ceiling prices" and that a suit for treble damages in the name of the Price Administrator would be instituted promptly against it in the U. S. District Court at Chicago.

On August 23, 1943, such a suit was filed against petitioner asking treble damages aggregating $150,000 (U. S. D. C. N. D. Ill., E. Div., Case No. 43 C775) (R., 4, 101). This suit is still pending.

Subsequently, on October 5, 1943, petitioner received a letter—as had been requested by it—from the Chief Enforcement Attorney at Chicago, setting forth "examples of most of the types of violations of the General Maximum Price Regulation which our investigation * * * disclosed existed on the part of" petitioner "in the sale of gloves" (R., 4, 39, 49). There were 112 such "examples."

This letter did not purport to set forth the grounds for claiming that petitioner's sales were at over-ceiling prices. But it was apparent that the Price Administrator then and for the first time had effected a change in the oral interpre-

tation of June 3, 1942, in which the propriety of the use of "in-line" pricing in determining petitioner's ceiling prices had been confirmed (R., 5).

As a part of the evidence in the protest filed with the Price Administrator, petitioner submitted schedules showing data with regard to all of the 112 alleged over-ceiling sales (R., 44 through 51). These schedules and other sworn evidence in the protest establish the fact that the March 17, 1942 published prices were fixed according to "in-line" pricing methods traditionally employed in the glove industry (R., 6, 42, 95-96).

Petitioner's Complaint in the Court Below.

In its complaint filed in the Emergency Court of Appeals the petitioner asked, first, that the provisions of Section 1499.2 of the General Maximum Price Regulation be set aside insofar as they exclude the use of "in-line" pricing methods by petitioner and others in the glove industry. Petitioner asked, secondly—and in the alternative,—that the provisions of that section of the Regulation be construed so as to permit the use of "in-line" pricing methods by petitioner and others in the glove industry. Thus, petitioner's relief would have been complete whether the Emergency Court of Appeals had to that extent set aside the provisions of the Regulation or had, in effect, modified its provisions by ordering the Price Administrator to place a construction upon them which would not do violence to Section 2(h) of the Act.

Price Administrator's Answer in the Court Below.

The Price Administrator not only has repeatedly admitted that "in-line" pricing is a "practice" of long standing in the glove industry, (R., 108) but he has also admitted

by his answer filed in the court below that petitioner determined its selling prices according to that practice (R., 109).

The Price Administrator also has made the binding admission that the use of the practice has been the only practicable way for petitioner and for others in the glove industry to fix the prices of the gloves manufactured and distributed by them (R., 94). He could hardly have admitted more flatly that the use of "in-line" pricing constitutes an *established means* and *aid to distribution* in the glove industry.

These admissions made by the Price Administrator in his answer filed in the court below are, under the law, binding admissions for the purposes of this case. The fact that the Price Administrator is an agent of an arm of the Government does not alter or detract from the binding effect of these admissions. *Henry Kaelin & Son* v. *United States* (D. C., E. D. N. Y.—1923), 290 Fed. 242. *In re Minot Auto Co.* (C. C. A., 8—1924), 298 Fed. 853. *First Nat. Bank* v. *United States* (D. C., Mo.—1932), 2 Fed. Supp. 107; affirmed, 65 F. (2d) 536; cert. den., 290 U. S. 652.

In the last-mentioned case, *First National Bank* v. *United States,* the Court said (2 Fed. Supp. at page 108):

> "When the United States of America comes into court, it comes, so far as regards practice and procedure, just as any other litigant; it is not to be hedged about by any attribute of a sacrosanct character. It will require a constitutionally valid statute to change the rule, and there is none in existence, either valid or invalid."

To the same effect are *United States* v. *Stinson* (1905), 197 U. S. 200, and *O'Brien* v. *United States* (C. C. A., 7—1931), 51 F. (2d) 674.

Original Opinion of the Emergency Court of Appeals.

At the time of the entry of its judgment—on May 1, 1945—dismissing petitioner's complaint, the court below filed its original opinion, which appears at pages 126 through 129 of the record. This opinion was later amended by the court. The character and substance of the amendment is discussed later on in this petition (pp. 16, 22), In its original opinion, the court found that (R., 129):

> "The question is narrow and leads to two inquiries; first, whether complainant has established by the evidence a customary *unvarying* practice which is traditional in the business history of complainant and others similarly situated, and, second, whether the method is a business practice within the meaning of Section 2(h) of the Act. If our decision is in the negative upon the first, it becomes unnecessary to decide the second" (*emphasis added*).

The court then found, apparently, that the first question should be answered in the negative. The court said (R., 129):

> "The record discloses that the so-called in-line pricing method and its characteristics were given careful consideration by the Administrator. He found from the evidence that the complainant's price differentials were not fixed or unvarying. Those in the December, 1941 price list varied from those in the March, 1942 list in many instances. As to many items, the differentials were increased; in others, they were decreased, and the evidence fails to establish a standard unvarying rule or to account for these discrepancies. The system as presented by complainant itself reflected many irregularities which are unexplained. We think the Administrator had before him substantial evidence to support his position that, while in-line pricing may represent a general tendency in the industry, it was not applied with precision by complainant, was not consistently or uniformly applied by it, and fell far

short of a fixed, steadfast, unvarying practice. We are unable to say as a matter of law that the Administrator was arbitrary and capricious in failing to frame the regulation so as to protect such an uncertain and irregular practice."

Petition for Rehearing.

Petitioner presented a number of grounds for its requested rehearing. Stated briefly, petitioner pointed out that (R., 133, 134):

> The court had narrowed the possible construction of the word "practice" for the purposes of this case. It had done so apparently without reference to any accepted construction of that term according to general usage; and it had done so expressly without reference to the meaning of that word as it is used in Section 2(h) of the Act.
>
> The court's construction of the term "practice" with relation to the practice here involved was tantamount to a finding that *all* business practices—according to the generally accepted meaning of that term—must be not only customary and traditional, but must be *unvarying*.
>
> There could be no reason for the court to narrow the general meaning of the word "practice" to a procedure that is unvarying where the respondent Price Administrator has admitted there *was* a practice, and the statute did not qualify the term "practice" by requiring that it be unvarying.

Petitioner also pointed out that (R., 135):

> Since, admittedly, the only practicable way to fix the selling prices of the gloves manufactured and distributed by the industry was through the use of "in-line" pricing, it constitutes an essential means and an aid to distribution within the meaning of Section 2(h) of the Act; but the court had not even considered the meaning of those terms.
>
> In view of the respondent's binding admissions in

that connection and the absence of any evidence to the contrary, under the provisions of Section 2(h) the Price Administrator was without power to change the practice of "in-line" pricing except to prevent circumvention or evasion of the provisions of the regulation or of the Act.

The Court's Amendment to Its Original Opinion.

Thereupon—on May 28, 1945—the court below entered an order denying the petition for rehearing, but amending its original opinion (R., 139). The court struck out the portion of the opinion quoted above (pp. 14-15) and substituted the following (R., 139, 140):

> "The question is narrow and leads to two inquiries. First, whether complainant has proved an established practice or means or aid to distribution in its business and, second, whether what has been done is a business practice or means or aid to distribution within the meaning of Section 2(h) of the Act. If our decision is in the negative upon the first, it becomes unnecessary to decide the second.
>
> "The record disclosed that the socalled in-line pricing system and its characteristics were given careful consideration by the Administrator. He found that 'many of the ramifications of in-line pricing * * * are not only irreconcilable with the regulation itself but their application would lead to circumvention and evasion, and render practical enforcement difficult.' Complainant's price differentials are not uniform. Those in the December 1941 price list varied from those in March 1942 list in many particulars. Many were increased. Others were decreased. According to the dictionaries, both lay and legal, a practice is a custom or usage, a customary usage, something habitually and uniformly performed. It implies uniformity and continuity. To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably. The system as presented

by complainant itself reflected many irregularities and in view of the unsatisfactory evidence, we think it cannot be said that the socalled in-line method was either an established practice or an established means or aid to distribution, uniformly followed or clearly settled. In other words, the proof does not disclose an established business practice or means or aid to distribution. We are unable to say as a matter of law that the Administrator was arbitrary and capricious in failing to frame the regulation so as to protect something which was not uniform, settled or established. Rather we think the Administrator had before him substantial evidence to support his position that, while in-line pricing may represent a general tendency in the industry, it was not applied with precision by complainant, was not consistently or uniformly applied by it, and fell far short of an established practice or means or aid to distribution."

QUESTIONS PRESENTED.

1. What is the correct construction of Section 2(h) of the Emergency Price Control Act, whereby the powers of the Price Administrator are limited with respect to compelling changes in "the business practices, cost practices or methods, or means or aids to distribution established in any industry", in its application to the practice of "in-line" pricing, as used in the glove industry and as used by petitioner in determining its March 1942 selling prices?

2. Was the decision of the Emergency Court of Appeals correct in determining that the practice of "in-line" pricing—which is admittedly a practice and the use of which has admittedly been essential to the glove industry—is neither a "practice", nor a "means" or an "aid to distribution", "established" in that industry within the meaning of the provisions of Section 2(h) of the Emergency Price Control Act?

(a) Was the Emergency Court of Appeals correct in holding that a "practice" must, in order to be a practice, be forever unvarying?

(i) Was this holding correct in view of the Price Administrator's repeated and legally binding admission that there *was* a "practice"?

(b) Was the Emergency Court of Appeals correct in holding that a practice can only be "established" in an industry if such practice is forever unvarying?

(i) Was this holding correct in view of the Price Administrator's legally binding admission that there was a practice and that it had been in general use in the industry for a period of more than 15 years?

(c) Was the Emergency Court of Appeals correct in holding that a practice, which is admittedly used as a means and an aid to distribution of an industry's products, must, in order to constitute an *established* means or aid to distribution in that industry, be a practice which is forever unvarying?

REASONS FOR GRANTING THE WRIT.

1. *The question presented involves a problem of importance in the administration of the emergency price control and the stabilization laws.*

Chester Bowles, Administrator v. *Seminole Rock & Sand Co.* (decided June 4, 1945), U. S. Supreme Court Case No. 914.

2. *The Emergency Court of Appeals has determined an important question of federal law which has not been, but should be, settled by this Court.*

Rule 38, par. 5(b) of Rules of the Supreme Court (U. S. C. A., Title 28, fol. sec. 354, Cum. An. Pckt. Part).

ARGUMENT.

1. *The court below has misconceived the nature of the practice and the manner of its operation.*

"In-line" pricing embraces within its structure a large number of differentials, each of which is represented by a cent-amount. As has been stated, in fixing the selling prices of gloves, these differentials are applied with respect to a large number of minor differences in construction features of the gloves being priced. They are applied and reflected in the selling prices of gloves within each single class of substantially identical styles of gloves.

The application of "in-line" pricing with respect to a single differential representing a single minor difference in construction as between two gloves within a particular class operates in this way: The price of one style of glove constructed with a certain feature carries a particular differential, expressed by a cent-amount, from the price of the style in the same class which is identical in construction except for that feature. The differential representing that feature is a fixed amount and is maintained between the prices of those two glove styles from one price list to the next. It is maintained without regard to and without relation to increases or decreases, from one price list to the next, in the selling prices quoted for those two styles of gloves. An increase of, for example, 10% in the selling prices of those styles, from one price list to the next, would not carry with it a corresponding increase in that differential. The difference in price between them would be the same on both lists.

This does not mean, however, that, once fixed, the cent-amount of that differential will never change. It does not mean that the cent-amount of that differential is the same

today as it may have been years ago when the feature which it represents was for the first time employed in the construction of that glove. During the period of more than 15 years within which "in-line" pricing has been used in the glove industry, the cent-amount of that differential might—although infrequently—have been slightly raised or slightly lowered. Nonetheless, the slight and infrequent rise or drop in such cent-amount has resulted from the application of "in-line" pricing methods and has been made in order to maintain a workable differential structure. It has not been done with reference to or in line with any increase or decrease in the selling prices of those two gloves. And that differential, the cent-amount of which has been fixed according to "in-line" pricing methods, has been maintained between the prices of the two glove styles since the particular feature was first employed in the construction of one of them. As has been established by petitioner's sworn statements (R., 6) and the Price Administrator's own admission through his answer filed in the court below, the use of the differentials embraced by the "in-line" pricing structure has been the only practicable way for the glove industry to price the gloves manufactured and sold by that industry.

In his opinion on denial of petitioner's protest, the Price Administrator admitted that "in-line" pricing is a *practice*. He gave only one reason in his opinion for finding that it was not a "*business* practice" within the protective scope of Section 2(h) of the Act. The reason he gave was that it is a "*pricing* practice", and that—on the authority of *Philadelphia Coke Co.* v. *Bowles* (Em. Apps.—1943), 139 F. (2d) 349—a "pricing practice does not fall within the prohibition of Section 2(h)" (R., 60).

The Emergency Court of Appeals, in its original opinion held that "in-line" pricing was not a practice. Its

holding was based solely on the ground that the practice was not *unvarying*.

Through the amendment to its opinion, the court both changed and added to the grounds for its original position. Under the amendment, the court stated as a ground for its conclusion the fact that "the dictionaries, both lay and legal," say that "a practice is a custom or usage, a customary usage, something habitually and uniformly performed." "It implies" said the Court, "uniformity and continuity."

Apparently the court was not satisfied with this—as can readily be understood. In the first place, the Price Administrator has consistently admitted that "in-line" pricing *is* a practice. In the second place, the court again impressed a construction upon the word "practice", which upon its face, is even narrower than was intended by the wording of the definitions selected by the court for its purposes. An equally accurate legal definition of "practice" is "an act often repeated by the same person," (*West* v. *Sun Cab Co.*, 154 A. 100, 103, 160 Md. 476), or "a succession of acts of a similar kind or in a like employment." 3 Bouv. Law Dict. Rawles Ed., 3rd Rev., p. 2650. And a practice of maintaining fixed amounts as differentials between glove styles, reflecting minor differences, in construction features, is still a practice even though the cent-amounts of those differentials may—at some time during the history of their use—be slightly raised or lowered.

The court then, and for the first time, turned to a consideration of the word "established". The court said in its amendment to the original opinion (R., 139): "To establish is to make stable or firm; to fix in permanence and regularity; to settle or secure on a firm basis, to settle firmly or to fix unalterably." But the court's state-

ment of the general meaning of the word "established" is perhaps even less enlightening than its discussion of the meaning of the word "practice". Moreover, the court's definition can hardly be distorted to the extent necessary to support its conclusion that the practice was not *established* in the glove industry. In addition, its conclusion is directly contrary to the Price Administrator's binding admission that "in-line" pricing has been in general use in the glove industry for a period of more than 15 years. In view of this admitted fact, the reason the Price Administrator himself has never denied it to be an "established" practice is obvious.

The court then refers to what it calls the "irregularities" presented and the "unsatisfactory evidence" concerning them. The "irregularities" to which the court refers consist of 28 selling prices of 28 gloves included in the March 27, 1942 published price list. The "unsatisfactory evidence" relates to petitioner's explanations concerning those 28 selling prices.

Contrary to the court's view, these irregularities indicate, at most, that some of the cent-amount differentials embraced by the "in-line" pricing structure and employed by petitioner in pricing its gloves shown on the March 17, 1942 price list were slightly raised or slightly lowered after the December 1941 price list was made up. They do not indicate that petitioner failed to follow, or that other manufacturers in the glove industry failed to follow—uniformly and consistently—"in-line" pricing methods or to apply the differentials fixed according to "in-line" pricing procedures in determining the selling prices of their gloves. The contrary has been established by the sworn statements of petitioner and the Price Administrator's own admissions.

Let us suppose that the practice of "in-line" pricing

involved the application of only one differential and the use of only one minor construction feature—instead of many differentials and many features. It would be patently unreasonable to say, in determining the existence or the uniform application of the practice, that once the cent-amount of that differential had been fixed, then—throughout the history of the practice—it could never be changed. It would be even more unreasonable to say, in determining the existence or the uniform application of a practice, that once the cent-amounts of a large number of differentials had been fixed, then—throughout the history of the practice—not one of those many differentials can ever be changed. In either case, the cent-amount of a differential may vary, but the consistent and uniform application of the *practice* does not.

Of the 28 so-called irregularities, 25 were taken from Schedules A through D, which were submitted as a part of the sworn evidence included in the protest (R., 44 through 51). These schedules embraced the 112 sales of 112 different styles which, according to the Price Administrator's claim, had been sold at over-ceiling prices. With respect to those 112 styles, the schedules show the selling prices in the December 1941 list, and the selling prices in the March 1942 list of each of the 112 styles.

The schedules show that the selling prices of 87 of the styles carried exactly the same penny-amount of difference, between their selling prices and those of the "in-line" base gloves within the same class, as were carried in the previous price list published in December, 1941. They show that the selling prices quoted for 25 of those styles in the March 1942 price list carried a slightly higher or lower difference, with respect to the selling prices of the "in-line" base gloves of the same model, than were carried in the previous price list published in December, 1941.

The notes to the schedules do contain explanations for 17 of the 25 changes in price differences carried forward from December, 1941 to the 1942 price list, which changes are reflected on the face of those schedules (R., 42, 43).

Without going into detail, these explanations indicate that changes in price differences between selling prices of gloves within the same class may occur between the issuance of one price list and the next for a number of reasons. They may occur (a) where the glove being priced involves extra material in its construction as compared to other gloves within the same class; (b) where the selling price of a particular glove is arbitrarily held down in order to permit its resale by retailers within a particular price range customarily employed by retailers; (c) where the kind of leather used in the construction of a particular glove style involves greater expense than the leather involved in the construction of the other substantially equivalent gloves in the same class; and (d) where a "tentative" selling price for a new style has—through inadvertence—been improperly fixed on the preceding price list with relation to the selling prices of other gloves in the same class. All of them are changes which must necessarily—though infrequently—be made in order to maintain a workable differential structure and a workable price structure for distribution of their gloves.

As petitioner pointed out to the court below, the most significant thing about the data concerning the 112 styles shown by the December, 1941 and March, 1942 price lists and on Schedules A through D is this:

Had markup methods common to the glove industry and other industries been followed by petitioner in making up its March 17, 1942 prices, *without* "in-line" pricing, then quite obviously the general increase of 10% in all of petitioner's selling prices would have resulted in a like

increase of 10% in the amounts of all differentials, reflecting the minor features employed in the construction of the various gloves in each class. And the application of each increased differential would have resulted in an upward change of 10% in the difference between the selling price of each glove carrying the feature as compared with the otherwise identical glove which did *not* carry that feature.

A differential of 25 cents in the December price list—reflecting a minor difference in construction—would have resulted in a corresponding 10% increase in that differential in the later March price list. Accordingly, such a 25 cent difference in the December price list between the selling price of the glove carrying that feature and the selling price of the same glove which did not carry that feature, would have increased to a 27½ cent difference in the March price list. And changes in the penny-amount of the differences between the selling price of gloves within the same class—instead of being reflected in the quoted price for only 28 glove styles—would have been reflected in the price quoted for each of the 167 glove styles.

Accordingly, these changes in price differences between gloves in the same class are not attributable to the application of markup methods commonly employed in other industries and employed by the glove industry in determining the overall selling price for each style of glove. The existence of such changes in price differences does not disprove or detract from the sworn evidence of petitioner and the binding admissions of the Price Administrator that the practice did exist and that the practice was uniformly applied by petitioner and by others in the glove industry.

2. *The use of "in-line" pricing does not open the door to "circumvention" or "evasion" of the Regulation or the Act.*

It is submitted that the sworn statements and other evidence submitted with the protest, taken with the binding admissions of the Price Administrator, have conclusively proved that "in-line" pricing is a business practice established in the glove industry. They have conclusively demonstrated that it is an established business practice and an established means and aid to distribution in the glove industry. Accordingly, the Price Administrator did not have the power to compel a change in the practice of "in-line" pricing unless it was necessary to do so in order to prevent circumvention or evasion of the provisions of the General Maximum Price Regulation or of the Act.

It is perfectly apparent that petitioner has had no intention or design to "circumvent" or "evade" the provisions of the General Maximum Price Regulation or of the Act, for its March 17, 1942 prices were prepared and published more than a month before that Regulation was even issued. The glove prices quoted on the March 17, 1942 price list had already been fixed on the customary "in-line" basis. They were in the hands of petitioner's customers and at least some glove styles in each separate class of substantially equivalent gloves had been sold at those prices and deliveries of them had been completed before the end of March, 1942. All of this had been completed almost a month before the General Maximum Price Regulation was issued.

Petitioner has never sought and is not now seeking to increase its prices over those published during the month of March, 1942. Hence, the Regulation's intended control over any increase in prices above that key month will not

be circumvened, evaded or otherwise affected by the relief sought by petitioner in this case. In the Price Administrator's own Statement of Considerations, filed on issuance of the Regulation, he tells us that:

> "The core of the General Maximum Price Regulation is its requirement that each seller charge no more than the prices which he charged during the base period,—March 1-31, 1942" (OPA Serv., Vol. 2, "General," Page 20,207).

The only other possible problem, involved in the question of "circumvention" or "evasion", relates to the enforcement of the Regulation. The court said that the Price Administrator had found that (R., 139):

> "'Many of the ramifications of "in-line" pricing * * * are not only irreconcilable with the regulation itself but their application would lead to circumvention and evasion, and render practical enforcement difficult.'"

It is submitted that this "finding" is not binding, and that it is valueless because the evidence clearly establishes the contrary.

Of course, difficulties of enforcement are not mentioned in the statute as a basis for possible circumvention or evasion; nor is there any other sound legal reason for excluding a practice simply because the Price Administrator is disposed to avoid enforcement difficulties. Such a practice is protected, under the provisions of Section 2(h), whether or not the existence or use of it may make it more difficult for the Price Administrator to enforce his Regulation.

But in any event, as we pointed out to the Price Administrator and to the court below, the evidence of this case clearly establishes the contrary to be true. The Price Administrator's investigation of the books and records of petitioner's sales, made before he started his $150,000 suit, revealed possible over-ceiling claims with respect

to 112 sales of 112 glove styles. The Price Administrator has before him, in the schedules submitted with the protest, a complete tabulation of all data concerning all of the 112 sales which he claims were made at over-ceiling prices. Petitioner has detailed price differences between the selling price of each of those styles and the substantially equivalent style used as a base for "in-line" pricing purposes, in determining the correctness—according to "in-line" methods—of the March 17, 1942 published selling prices. Already, the Price Administrator is admittedly satisfied as to the correctness of the selling prices, determined under "in-line" methods, for the styles involved in 87 of those sales. Thus the standard for determining the ceiling prices for those 87 styles is as definite and certain as the standard which he seeks to employ. Nor is it any more easily evaded.

At most, he now needs only to determine whether petitioner failed to follow the practice because it did not maintain the same price differences in the March list as it did in the December list between the selling prices of 25 styles and the selling prices of other styles in the same class as those styles. He cannot refuse to hear petitioner's explanation, in an enforcement court, of the propriety of its determination of those 25 prices under "in-line" methods by the simple expedient of disclaiming here that the practice ever existed or that it was ever established.

If in raising or lowering the amounts of any of those differentials, the petitioner has failed to follow "in-line" pricing methods, this, again, does not disprove the existence of the practice. Whether or not petitioner, in any of those instances, failed correctly to apply "in-line" pricing methods is a matter for determination by an enforcement court.

Conclusion.

The conclusion is inescapable that, so far as the existence and use of the practice is concerned, the lower court should have considered itself bound by the sworn statements of the petitioner and the admissions of the Price Administrator. Accordingly, "in-line" pricing did exist as a practice—not as a general tendency—and it was an established practice and an established means and aid to distribution which had been used continuously in the glove industry for more than 15 years. It was employed by petitioner and by others in the glove industry as a means of fixing the prices for their gloves. It was also employed as a means and an aid to the distribution of their gloves. It was not necessary for the Price Administrator to attempt to compel a change in that practice or to compel the petitioner or others, similarly situated, to roll back their prices for a period of almost four months, or for any other period, in order to prevent circumvention or evasion of the provisions of his Regulation or of the Act. It was unnecessary for him to do so, either for the purpose of holding glove prices at the March 1942 level or for the purpose of enabling him effectively to enforce the provisions of his Regulation.

PRAYER.

For the reasons stated in this petition, a writ of certiorari should issue to review the judgment of the United States Emergency Court of Appeals to the end that the judgment of that court be reversed by this Honorable Court, and that your petitioner shall have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

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